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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 807

DEWITT E. TAYLOR, PETITIONER

v.

JOHN L. FAHS, Individually and as United States Collector of Internal Revenue for the District of Florida

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The District Court rendered no opinion. Its findings of fact and conclusions of law (Pet. 1A-5A) are not reported. The opinion of the Court of Appeals (Pet. 6A-10A) is reported at 239 F. 2d 224.

JURISDICTION

The judgment of the Court of Appeals was entered on November 30, 1956. (Pet. 11A.) The petition for a writ of certiorari was filed on February 28, 1957. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether the Court of Appeals correctly held that a loss sustained by the taxpayer from the sale of real estate was not attributable to the operation of a trade or business regularly carried on by him and, therefore, that he was not entitled to a net operating loss carryback under Section 122 of the Internal Revenue Code of 1939.

STATUTE INVOLVED

The relevant portions of Sections 23(s) and 122(a), (b)(1), (c) and (d) (4) and (5) of the Internal Revenue Code of 1939 are set forth in the Appendix, *infra*, pp. 8-10.

STATEMENT

The basic evidentiary facts in this case are undisputed. (Pet. 9A.)

The taxpayer is an individual residing in Polk County, Florida. (Pet. 1A.) He was a native of Detroit, Michigan, where his father had long been in the real estate business. He moved to Florida in 1923, where, in 1925, he acquired substantial acreage which he subdivided and made into a townsite with adjacent farm tracts. The collapse of the Florida real estate boom followed soon thereafter, and he continued to improve and sell off the lots and farms in the vicinity of the town over the succeeding twenty-seven years. (Pet. 7A.)

The taxpayer's father died in 1927, leaving five lots in a subdivision in Detroit, Michigan, which had not been sold. These lots were left in undivided shares to the taxpayer and in trust for his sister. They were residential lots in an area which was becoming undesirable for residential purposes. His interest in the property was originally a one-sixth undivided interest but later

was one-third, and by 1939 he had an outright one-half undivided interest. The property was managed by the Detroit Trust Company, as testamentary trustee for the sister and as agent for the taxpayer. (Pet. 7A.)

An effort was made between 1932 and 1935 by the taxpayer and the Trust Company, as his agent, to break the restrictions to residential use affecting these lots. This was done by the building of a filling station on one of the lots and inviting litigation that ended successfully in 1935 or 1937. This lot was leased thereafter until it was sold in 1944. (Pet. 7A-8A.)

During the intervening years, the taxpayer acquired and operated orange groves and other properties in Florida and was a partner in a general merchandise store in Grosse Point, Michigan, which he visited occasionally. He was also a tire dealer and owned some garage property in Florida.

The taxpayer was divorced in 1940 and conveyed all of his Michigan property, including the filling station lot in Detroit, to the Bankers Trust Company of Detroit, as trustee, to secure the punctual performance of his alimony agreement to pay $3,000 a year to his wife. The conveyance gave the trustee the right to sell such property as necessary to provide for punctual payment. It also provided that the taxpayer might substitute other property if, in the opinion of the officers of the trustee, this would "entirely and safely secure the punctual payments of the" required sums. (Pet. 8A.)

In 1944, the filling station lot in Detroit was sold at a loss by the taxpayer and/or the Bankers Trust Company as to his interest, and by the Detroit Trust Company as to his sister's interest. In the same year the taxpayer sold at a loss several Florida tracts. (Pet. 8A.)

The sole question presented in this suit for refund is whether the loss of $23,307.29 occasioned by this sale, in 1944, of the filling station lot in Detroit was attributable to the operation of a trade or business regularly carried on by the taxpayer and thus constituted a net operating loss which he is entitled to carry back to the years 1942 and 1943 under Section 122 of the Internal Revenue Code of 1939. (Pet. 4A, 8A.) The district court held that the taxpayer is entitled to the net operating loss deduction claimed. (Pet. 5A.) The Court of Appeals for the Fifth Circuit reversed. (Pet. 6A-11A.)

ARGUMENT

1. The decision of the Court of Appeals is correct and turns upon the particular facts of the case, all of which are uncontroverted. As above noted, the single issue presented is whether the loss sustained by the taxpayer from the sale, in 1944, of the filling station lot in Detroit was attributable to the operation of a trade or business regularly carried on by him within the meaning of Section 122(d)(5) of the Internal Revenue Code of 1939 (Appendix, *infra*, p. 10). If not, the deduction of the loss under the net operating loss carryback provision is precluded by the exceptions and limitations provided in that section.

The record discloses that the taxpayer inherited an undivided interest in the Detroit property from his father. (Pet. 2A.) Thus, the acquisition of the property was entirely unrelated to the operation of any trade or business by the taxpayer. Moreover, the taxpayer did not thereafter hold or use the property in connection with the operation of any trade or business. On the contrary, the property was not held by the taxpayer at all during the pertinent years, since it was

conveyed by him in 1940 to the Bankers Trust Company of Detroit to secure the punctual performance of his agreement to pay alimony to his former wife, and it was held by that institution until it was sold in 1944. (Pet. 8A.) While the taxpayer may have been in the business of subdividing and selling real estate in Florida where he lived, it is clear that his acquisition and holding of the Detroit property were in no way connected with his Florida real estate operations.[1] Although the taxpayer was a member of a partnership which operated a general store in Michigan (Pet. 3A), there is no evidence that he was engaged in the real estate business in Michigan, either when the Detroit property was sold or at any other time[2] (Pet. 10A). The undisputed evidence, therefore, fully supports the conclusion reached by the court below that the Detroit property was not related to the operation of any trade or business by the taxpayer.

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[1] The district court found, negatively, that (Pet. 3A) "there is no evidence that he [taxpayer] intended to handle the Detroit property in any way differently than he handled his Florida property which admittedly was being sold in the usual course of a going real estate business." Of course the taxpayer, as plaintiff in this refund suit, had the burden of proof and the significant fact is that there is no evidence that the Detroit property had any connection with or relationship whatever to the taxpayer's activities in the subdivision and sale of land in Florida. On the contrary, the manner in which the property was acquired and used indicates the absence of any such relationship.

[2] The district court mistakenly took the view that, since the taxpayer's father had been in the real estate business in Detroit and the property involved was a remnant of a subdivision held by him as a real estate dealer, the taxpayer must be considered as having continued his father's real estate business. (Pet. 4A-5A.) Evidence as to the business of the taxpayer's father does not, of course, establish anything so far as the taxpayer's business is concerned, and the taxpayer's one real estate transaction in Detroit establishes, at most, an isolated transaction. Cf. *Dalton* v. *Bowers*, 287 U. S. 404; *Burnet* v. *Clark*, 287 U. S. 410.

2. The Court of Appeals did not exceed the proper scope of review. The district court's conclusion that the taxpayer is entitled to the net operating loss carry-back deductions sought (Pet. 5A) is contrary to the undisputed facts and is premised fundamentally upon negative findings as to the absence of evidence (Pet. 3A, 5A) which, at best, disclose that the taxpayer failed to sustain his burden of proof. The evidentiary facts are uncontroverted and are not such as are reasonably susceptible of conflicting inferences. As the Court of Appeals said (Pet. 10A):

> Coupling the complete lack of any real estate business conducted by the appellee in Michigan during the year 1944, or in fact at any time, with the circumstance that this property was at all times here relevant put to the highly personal and restricted use of standing as security for his alimony payments and with actual legal title in a trustee for that purpose, produces a result that cannot justify a finding by the trial court or by us that this lot was held by the taxpayer for sale in the conduct of any business regularly engaged in by him.

Accordingly, the Court of Appeals correctly reversed the judgment of the district court. *United States* v. *Gypsum Co.*, 333 U.S. 364, rehearing denied, 333 U.S. 869; *Orvis* v. *Higgins*, 180 F. 2d 537 (C.A. 2d), certiorari denied, 340 U.S. 810; *Dollar* v. *Land*, 184 F. 2d 245 (C.A. D.C.), certiorari denied, 340 U.S. 884.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1957.

APPENDIX

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(s) [As added by Sec. 211(a), Revenue Act of 1939, c. 247, 53 Stat. 862] *Net Operating Loss Deduction.*—For any taxable year beginning after December 31, 1939, the net operating loss deduction computed under section 122.

[26 U.S.C. 1952 ed., Sec. 23.]

SEC. 122 [As added by Sec. 211(b), Revenue Act of 1939, *supra*]. NET OPERATING LOSS DEDUDTION.

(a) [As amended by Sec. 105(e)(3)(A), Revenue Act of 1942, c. 619, 56 Stat. 798] *Definition of Net Operating Loss.*—As used in this section, the term "net operating loss" means the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d).

(b) [As amended by Sec. 153(a), Revenue Act of 1942, *supra*] *Amount of Carry-Back and Carry-Over.*—

(1) *Net operating loss carry-back.*—If for any taxable year beginning after December 31, 1941, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the second preceding

taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6) and (B) by determining the net operating loss deduction for such second preceding taxable year without regard to such net operating loss.

* * * * *

(c) [As amended by Secs. 105(e)(3)(B) and 153(b), Revenue Act of 1942, *supra*] *Amount of Net Operating Loss Deduction.*—The amount of the net operating loss deduction shall be the aggregate of the net operating loss carry-overs and of the net operating loss carry-backs to the taxable year reduced by the amount, if any, by which the net income (computed with the exceptions and limitations provided in subsection (d)(1), (2), (3), and (4)) exceeds, in the case of a taxpayer other than a corporation, the net income (computed without such deduction), or, in the case of a corporation, the normal-tax net income (computed without such deduction and without the credit provided in section 26(e));

(d) [As amended by Sec. 105(e)(3)(C), Revenue Act of 1942, *supra*] *Exceptions, Additions, and Limitations.*—The exceptions, additions, and limitations referred to in subsections (a), (b), and (c) shall be as follows:

* * * * *

(4) [As amended by Sec. 150(e), Revenue Act of 1942, *supra*] Gains and losses from sales or exchanges of capital assets shall be taken into account without regard to the provisions of section 117(b). As so computed the amount deductible on account of such losses shall not ex-

ceed the amount includible on account of such gains.

(5) Deductions otherwise allowed by law not attributable to the operation of a trade or business regularly carried on by the taxpayer shall (in the case of a taxpayer other than a corporation) be allowed only to the extent of the amount of the gross income not derived from such trade or business. For the purposes of this paragraph deductions and gross income shall be computed with the exceptions and limitations specified in paragraphs (1) to (4) of this subsection.

* * * * *

(26 U.S.C. 1952 ed., Sec. 122.)

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